IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN
BENCH AT JAIPUR.

J U D G M E N T

Rehmat-tulla vs. Central Bank of India & Ors.

S.B.Civil First Appeal No.140/1990
under Section 96 C.P.C. against the
judgment and decree dated 15.2.1990
passed by Shri Mahesh Chander Purohit
RHJS, Additional District Judge No.3,
Kota in Civil Suit No.249/1988.

Date of Judgment :::::: August 8, 2006

PRESENT

HON'BLE MR.JUSTICE KHEM CHAND SHARMA

Mr.D.K.Soral for appellant.
Mr.R.P.Vijay for respondent Nos.4 and 5.

BY THE COURT:-

The facts leading to this appeal in brief are that Central Bank of India, plaintiff-respondent herein instituted a suit under order 37 C.P.c. for money decree against five defendants including the defendant appellant Rehmat-tulla. Defendant Nos.2 and 3 were the partners of

the firm Defendant No.1 while defendant Taiyab Ali and Burhanuddin were the guarantors. Despite service of summons defendant Nos.1 and 2 did not appear and therefore, vide order dated 24.1.1989 ex parte proceedings were ordered against them. However, defendant appellant Rehmat-tulla filed an application under Order 37 rule 3 C.P.C. for leave to defend mentioning inter alia that the suit was time barred against him. The learned trial court after hearing the parties vide vide order dated 15.2.1990 dismissed the application holding that no substantial defence was raised and simultaneously decreed the suit vide judgment and decree dated 15.2.1990.

2. Hence, the instant first appeal.

3. Learned counsel for the appellant contended that the suit was filed on 9.4.1984 and the plaintiff claimed that the suit was within the limitation on the basis of the acknowledgment dated 9.4.1981 by defendant No.2 Fakruddin. Counsel contended that it was averred in the plaint that defendant No.2 acknowledged the due amount of loan and signed the document on his behalf and on behalf of the firm but there is no acknowledgment of the loan amount by the appellant. Therefore, the suit cannot be treated to be within the limitation against the appellant. Counsel further contended that the partnership firm which came into existence on 12.6.1973 came to be dissolved on 8.1.1979

with the mutual consent of the parties and as per this dissolution agreement, all the liabilities of the earlier as well of the future transactions of the firm were on defendant No.2 Fakruddin and the defendant appellant was not liable for any transaction as he ceased to be a partner of the firm. Relying on the decision of the Larger Bench of Allahabad High Court in the case of *M/s Mansa Ram & Sons (Bankers)* Vs.*Janki Dass Om Prakash* **(AIR 1984 All.267),** counsel contended that the endorsement made by one of the partners of the firm if does not disclose this fact that the endorsement made by him was on his behalf and on behalf of the firm also then such endorsement cannot be taken as an acknowledgment, as required under Sections 18,20 of the Limitation Act. The contention of the learned counsel for the appellant is further to this effect that as the suit of the plaintiff was time barred, this defence was taken by the defendant appellant in the application filed for leave to defend which was a substantial and bonafide defence and the same has to be taken into consideration by the learned trial court while disposing the application of the defendant appellant. Referring to the principles laid down by their Lordships in their judgment in the case of M/s.Mechalec Engineers & Manufacturers vs. M/s.Basic Equipment Corporation **(AIR 1977 SC 577)**, counsel contended

that it is only in cases where the defence is patently dishonest or so unreasonable that it could not reasonably be expected to succeed that the exercise of discretion by the trial court to grant leave unconditionally may be questioned.

4. After hearing learned counsel for the appellant, I have gone through the material available on record, the relevant provisions of CPC as well as the decisions cited at the bar.

5. Order 37 Rule 3(5) of CPC provided that the defendant may, at any time within ten days from the service of such summons for judgment, by affidavit or otherwise disclosing such facts as may be deemed sufficient to entitle him to defend, apply on such summons for leave to defend such suit, and leave to defend may be granted to him unconditionally or upon such terms as may appear to the Court or Judge to be just:

Provided that leave to defend shall not be refused unless the Court is satisfied that the facts disclosed by the defendant do not indicate that he has a substantial defence to raise or that the defence intended to be put up by the defendant is frivolous or vexatious:

Provided further that, where a part of the amount claimed by the plaintiff is admitted by the defendant to be

due from him, leave to defend the suit shall not be granted unless the amount so admitted to be due is deposited by the defendant in Court.

6. In the case of Smt.Kiranmoyee Dassi vs. Dr.J.Chatterjee {(1945)49 Cal WN 246}Das.J, after a comprehensive review of authorities on the subject, stated the principles applicable to cases covered by Order 37 C.P.C. in the form of the following propositions, which have been relied upon by their Lordships of the Supreme Court in the case of M/s Mechalec Engineers (supra):-

> (a) If the defendant satisfies the Court that he has a good defence to the claim on its merits the plaintiff is not entitled to leave to sign judgment and the defendant is entitled to unconditional leave to defend.
>
> (b) If the defendant raises a triable issue indicating that he has a fair or bonafide or reasonable defence although not a positively good defence the plaintiff is not entitled to sign judgment and the defendant is entitled to unconditional leave to defend.
>
> (c) If the defendant discloses such facts as may be deemed sufficient to entitle him to defend that is to say, although the affidavit does not positively and immediately make it clear that he has a defence, yet, shews such a state of facts as leads to the inference that at the trial of the action he may be able to establish a defence to the plaintiff's claim the plaintiff is not entitled to judgment and the defendant is

entitled to leave to defend but in such a case the Court ma in its discretion impose conditions as to the time or mode of trial but not as to payment into Court or furnishing security.

(d) If the defendant has no defence or the defence set up is illusory or sham or practically moonshine then ordinarily the plaintiff is entitled to leave to sign judgment and the defendant is not entitled to leave to defend.

(e) If the defendant has no defence or the defence is illusory or sham or practically moonshine then although ordinarily the plaintiff is entitled to leave to sign judgment the court may protect the plaintiff by only allowing the defence to proceed if the amount claimed is paid into Court or otherwise secured and give leave to the defendant on such condition and thereby show mercy to the defendant by enabling him to try to prove a defence."

7. In the light of the above principles laid down by Das J. and relied upon by their Lordships of the Supreme Court in the case of M/s. Mechalec Engineers (supra) if the application of the defendant appellant moved before the learned trial court seeking leave to defend is considered, I find that the defendant appellant has been able to raise a triable issue indicating that he has a fair, bonafide and reasonable defence as in the application supported by an affidavit it was mentioned that the partnership which came into existence in between the defendant-appellant and Fakruddin (defendant No.2 in the suit) on 12.6.73 came to be dissolved w.e.f. 8.1.1979 through a document and as per

the agreement between the parties, defendant Fakruddin was liable for the payment of the loan amount and also for the future transactions of the firm. The case of the defendant appellant therefore, was to this effect that after his retirement from the firm, he was not liable for any transaction and the suit against him was time barred.

8. A bare perusal of the impugned judgment would reveal that the learned trial court has failed to consider this aspect of the case that in the light of the defence raised by the defendant appellant through the application he was able to make out the following triable issues:-

i. whether the appellant can be held liable for payment of the loan amount after his retirement from the firm or as per the mutual agreement between the parties, it was the liability of defendant Fakruddin ?

ii. whether he was bound by the acknowledgment of loan amount alleged to have been made by defendant Fakruddin ? and

iii. whether the endorsement alleged to have been made by defendant Fakruddin, can be said to be an acknowledgment as required under Sections 18 and 20 of the Limitation Act for the purpose of limitation for filing a suit for recovery of money borrowed by the firm.

In such circumstances, I am of the opinion that the learned trial court was not justified in dismissing the application of the defendant appellant and in decreeing the suit against him.

9. In the result, this first appeal is allowed. The

impugned judgment and decree of the learned trial court against defendant appellant is set aside and the learned trial court is directed to proceed with the suit in accordance with law.

(K.C.Sharma),J.

bairwa